No. 16457

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT JOHNSON and DONA JOHNSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

A jury found appellants guilty on three counts of a four-count Indictment on March 13, 1958, after trial in the United States District Court for the Southern District of California [C. Tr.* 22-23; Tr.** 334-339]. Count One charged that Robert Johnson transferred 690 grains of marijuana to Adrienne Simmrin on or about November 14, 1957, in violation of 26 U. S. C., Sec. 4742(a). Count Two charged that Dona Johnson transferred two ounces, 156 grains of marijuana to Adrienne Simmrin on or about November 26, 1957, in violation of 26 U. S. C., Sec. 4742(a). The Court granted a motion for judgment of acquittal on this count [C. Tr. 22-23]. Count Three charged that Robert and Dona Johnson concealed two ounces, 223 grains of marijuana on or about

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*C. Tr. refers to the Clerk's Transcript of Record.

**Tr. refers to the Reporter's Transcript of the trial on March 11, 12 and 13 and April 7, 1958.

November 26, 1957, in violation of 21 U. S. C., Sec. 176(a). Count Four charged that Robert Johnson concealed 36 grains of marijuana on or about November 26, 1957, in violation of 21 U. S. C., Sec. 176(a) [C. Tr. 2-3]. On April 7, 1958, the Court sentenced Robert Johnson to ten years on each of Counts One, Three and Four, to run concurrently; the Court sentenced Dona Johnson to five years on Count Three [C. Tr. 30-32]. The District Court had jurisdiction under 18 U. S. C., Sec. 3231. Appellants filed notice of appeal within the time provided by law [C. Tr. 37]. This Court has jurisdiction under 28 U. S. C., Sec. 1291.

Statement of Facts.

Two persons named Marks and Berger were arrested for the sale and possession of marijuana on September 12, 1957. They told Federal Narcotics Agents Katz and Lang that their source of supply was Robert Johnson, whom they described as white, male American, blond hair, early twenties, six feet tall, 185 pounds and wearing a goatee [S. Tr.* 60-63].

Robert and Dona Johnson lived in Apartment 3 at 20652 Pacific Coast Highway, Malibu, California [S. Tr. 10, 15, 39; Tr. 240, 257].

On November 14, 1957, a Special Employee of the Federal Bureau of Narcotics made arrangements with Adrienne Simmrin for her to buy some marijuana.** He

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*S. Tr. refers to the Reporter's Transcript of hearings on appellants' motion to suppress evidence on February 10 and 14, 1958.

**The Special Employee was known to Adrienne Simmrin as Chuck Iskowitz [Tr. 75-80]. Compare with the statement at page 7e of Appellants' Brief: "The Government refused to disclose the name of the special employee on the grounds of privilege and said they were going to take that position throughout the trial (R. T. 94, transcript of Feb. 10 and Feb. 14, 1958)."

picked Miss Simmrin up at her apartment, 152 South Reeves Drive, Beverly Hills, California, at about 9:45 p.m., and they drove to 20652 Pacific Coast Highway. During the trip she said that she was going to "pick up" from Bob Johnson. After they arrived Miss Simmrin went into Apartment 3 for about ten minutes. She met Robert Johnson there and asked him if he had two cans of "marijuana pot." He gave her two envelopes containing 690 grains of marijuana and she gave him $20 which she had gotten from the Special Employee. This was the transfer charged in Count One. She returned to the Special Employee's car and they drove back to her apartment. Later, the Special Employee met the federal narcotics agents and turned the marijuana over to them. Miss Simmrin was followed during the evening by Agent Katz and four or five other federal narcotics agents, including Agents Lang and Jackson [S. Tr. 63-70; Tr. 58, 75-80, 89-92, 99-104, 161-163, 184].

On November 26, 1957, Agent Katz gave the Special Employee $20 in marked official advance funds.* The Special Employee again picked up Miss Simmrin at her apartment and they drove to 20652 Pacific Coast Highway. They arrived at about 1:30 p.m. Miss Simmrin went to Apartment 3 and either knocked or rang the bell. No one answered. She returned to the Special Employee's car and they drove off. They returned about 2:30 p.m. and Miss Simmrin again went to the door and knocked. Again, no answer. She returned to the Special Employee's car and they drove away. They returned

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*The Special Employee was known to Agent Lang as Burl Ramm [S. Tr. 102]. Compare with the statement at page 7e of Appellants' Brief that: "The government refused to disclose the name of the special employee on the grounds of privilege and said they were going to take that position throughout the trial (R. T. 94, transcript of Feb. 10 and Feb. 14, 1958)."

about 3:00 p.m. This time Dona Johnson answered. Miss Simmrin went into the apartment and stayed for about ten minutes. She returned to the Special Employee's car and they started away, but only after the Special Employee had given a pre-arranged hand signal to the agents indicating that Miss Simmrin had bought some marijuana. About half a mile down the road Agent Lang and others arrested Adrienne Simmrin. She had two plastic packages of marijuana in her possession which she had bought from Dona Johnson. She was followed during the afternoon by Agents Katz and Lang [S. Tr. 70-77, 101-106].

The narcotics agents had no advance knowledge that Miss Simmrin and the Special Employee were going to the Johnson Apartment on November 26th [S. Tr. 117, 135]. The Apartment, incidentally, was about an hour's drive from the United States Attorney's and United States Commissioner's offices in the Federal Building [S. Tr. 136-137].

Immediately after Simmrin's arrest, Agents Lang, Katz, Jackson and others went to Apartment 3 and rang the bell or knocked. Dona Johnson answered the door. Before entering, Agent Lang (1) showed her his credentials, (2) told her that he was a Federal Narcotics Agent, and (3) told her that she was under arrest for selling marijuana to Adrienne Simmrin [S. Tr. 106-109, 127-128; Tr. 104, 163-164, 177-178, 182]. The agents then searched the apartment in Dona Johnson's presence with these results:

(1) Agent Jackson found the $20 in marked money in the bedroom [S. Tr. 109-111; Tr. 105, 185].

(2) Agent Jackson found two plastic packages of marijuana in the bedroom [S. Tr. 111-112; Tr. 59-60, 105-106, 165, 186].

(3) Agent Walton found marijuana in the kitchen area [S. Tr. 112; Tr. 60-61, 107-108, 165-166, 200].

The marijuana found in the bedroom and kitchen area was the concealment charged in Count Three.

The search took place between 3:45 p.m. and 4:50 p.m. [S. Tr. 128; Tr. 153, 179].

Soon after the search Robert Johnson drove up in a cream-colored Cadillac Coupe de Ville, wearing a duck-tail type haircut and a goatee. Agent Katz arrested him while he was still in the Cadillac. Agents Jones, Jackson, Cullen and Walton then searched the car in Johnson's presence. Agent Jones found an envelope containing marijuana under the front seat [S. Tr. 138-143; Tr. 108-109, 166-168, 188-191, 209-213, 244]. This was the concealment charged in Count Four.

I.

The Evidence Should Be Viewed Most Favorably to the Government.

Defense Counsel has quoted at length from the testimony of Robert and Dona Johnson, as though the Judge believed their testimony and disbelieved that of the Government witnesses (Appellants' Br. pp. 7a-7g). Suffice it to say that this Court should not weigh the evidence or pass on the credibility of witnesses. The convictions should be sustained if there was substantial evidence, taking the view most favorable to the Government, to support it.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Dean v. United States, 246 F. 2d 335, 336-337 (8th Cir., 1957);

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955), cert. den. 350 U. S. 954 (1956);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), cert. den. 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

O'Leary v. United States, 160 F. 2d 333 (9th Cir., 1947).

II.

There Were No Unlawful Searches and Seizures in Violation of the Fourth and Fifth Amendments.

We begin with the basic principle that a search of the person and "the place where the arrest is made" is valid if it is incident to a lawful arrest.

Agnello v. United States, 269 U. S. 20, 30 (1925);

Carroll v. United States, 267 U. S. 132, 158 (1924);

Weeks v. United States, 232 U. S. 383, 392 (1914).

Perhaps the best statement of this principle is in *United States v. Rabinowitz,* 339 U. S. 56, 61 (1950), where the Court said:

> "Decisions of this Court have often recognized that there is a permissible area of search beyond the person proper. Thus in *Agnello v. United States,* 269 U. S. 20, 30, this Court stated:
>
> > 'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as

weapons and other things to affect an escape from custody, is not to be doubted.'

"The right 'to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed' seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest. *Weeks v. United States,* 232 U. S. 383, 392. It became accepted that the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search was not 'unreasonable.' *Agnello v. United States,* 269 U. S. 20, 30; *Carroll v. United States,* 267 U. S. 132, 158; *Boyd v. United States,* 116 U. S. 616, 623-24."

Were the arrests in this case lawful? 26 U. S. C. (Supp. V), Sec. 7607, added by Sec. 104(a) of the Narcotic Control Act of 1956, 70 Stat. 570, provides as follows:

"The Commissioner . . . and agents, of the Bureau of Narcotics . . . may—

* * * * * * * *

"(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The only question then is whether the Agents had "reasonable grounds" within the meaning of Section 104(a), *supra,* and "probable cause" within the meaning of the Fourth Amendment* to believe that Robert and Dona Johnson had committed or were committing violations of the narcotic laws.

In *Brinegar v. United States,* 338 U. S. 160, 175 (1949), the Court defined "probable cause" in these words:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' *McCarthy v. De Armit,* 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion, 267 U.S. at 161. And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke v. United States,* 7 Cranch 339, 348. Since Marshall's time at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a

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*The terms "reasonable grounds" in Sec. 104(a) and "probable cause" in the Fourth Amendment mean substantially the same thing. *Draper v. United States,* 358 U. S. 307, 310 (1959).

man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States,* 267 U.S. 132, 162.

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

Statements of a special employee may be "reasonable grounds" and "probable cause" for an arrest.

Draper v United States, 358 U. S. 307, 311-312 (1959).

What were the facts showing "reasonable grounds" and "probable cause" for the arrest of Dona Johnson?

On November 26, 1957, the Special Employee picked up Miss Simmrin about 1:30 p.m. and they drove to Dona Johnson's place at 20652 Pacific Coast Highway. After two tries, Miss Simmrin finally found Dona Johnnson at home. Miss Simmrin went into the Apartment and bought $20 worth of marijuana from Dona Johnson.

Agent Lang, who had been following Miss Simmrin arrested her soon after she left the apartment and, a short time later, returned to the apartment and arrested Dona Johnson [S. Tr. 70-77, 101-106]. In denying a motion to suppress, Judge Byrne said:

> "But at any rate, in this particular case under the circumstances of this case there was probable cause for the arrest, and after the arrest the search had to be made immediately or the evidence would have disappeared, and under those circumstances—that is the type of case where it is proper to make a search without going down.
>
> "The evidence here shows that there had been several calls at the home of Dona Johnson and she wasn't there. No one answered the phone. She wasn't there constantly—answered the door, rather —and finally they found her at the door. That is when the sale was made to Simmrin, apparently. There was reasonable cause to believe that a sale was made to Simmrin. And after that sale was made to Simmrin, of course they couldn't go back and arrest Johnson and then go and expect to get a search warrant and find anything there. The search had to be made immediately after the arrest was made. And insofar as waiting to make the arrest, it was reasonable to believe that they might not even have found her there" [S. Tr. 146-147].

What were the facts showing "reasonable grounds" and "probable cause" for the arrest of Robert Johnson?

Marks and Berger were arrested for the sale and possession of marijuana on September 12, 1957. They told Federal Narcotics Agents Katz and Lang that their source

of supply was Robert Johnson, whom they described as white, male, American, blond hair, early twenties, six feet tall, 185 pounds, and wearing a goatee [S. Tr. 60-63].

On November 14, 1957, the Special Employee picked up Miss Simmrin and they drove to Mr. Johnson's home at 20652 Pacific Coast Highway. During the trip she said that she was going to "pick up" from Bob Johnson. When they arrived she went into Apartment 3 and bought two envelopes of marijuana from Robert Johnson [S. Tr. 63-70]. She was followed by Agent Katz and four or five other agents [S. Tr. 63-69].

On November 26, 1957, the agents searched Johnson's apartment incident to the arrest of Dona Johnson, and found marijuana in the kitchen and bedroom [S. Tr. 111-112]. Soon after the search, Robert Johnson drove up in his Cadillac, wearing a ducktail haircut and a goatee [Tr. 166-168, 243]. Agent Katz arrested him in his car [S. Tr. 87-90].

The Government argues that the above facts show that the agents had "reasonable grounds" and "probable cause" for believing that both Robert and Dona Johnson had committed or were committing felonies.

We now come to the searches. Our only question is whether they went beyond the places where the arrests were made, or as stated in *Rabinowitz, supra,* whether they went beyond the premises "under the control" of the persons arrested.

The search of the Apartment was incident to the arrest of Dona Johnson.

Clearly, the entire Apartment was under her control. In *Hamer v. United States,* 259 F. 2d 274 (9th Cir., 1958), cert. denied 359 U. S. 916 (1959), petition for rehearing

denied 359 U. S. 962 (April 6, 1959), for instance, the search of Mrs. Hamer's home and "an unlocked 4′ x 4′ laundry room, in the rear yard" was held valid as being incident to a lawful arrest therein. And in *Harris v. United States,* 331 U. S. 145, 151-152 (1947), the Court again upheld the search of an entire dwelling incident to a lawful arrest. The Court said:

> "The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in *Agnello v. United States, supra,* at 30, it was said: 'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.' It is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contracted to a business premises, is subjected to search.
>
> "Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested. Petitioner was in exclusive possession of a four-room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested. The canceled checks and other instrumentalities of the crimes charged in the warrants could easily have been concealed in any

of the four rooms of the apartment. Other situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive. But the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment."

See also:

Marron v. United States, 275 U. S. 192, 198-199 (1927);

Agnello v. United States, 269 U. S. 20, 30 (1925);

United States v. Lindenfeld, 142 F. 2d 829 (2d Cir. 1944) cert. den. 323 U. S. 761 (1944);

Matthews v. Correa, 135 F. 2d 534 (2d Cir., 1943);

United States v. 71.41 Ounces Gold, 94 F. 2d 17 (2d Cir., 1938).

The search of the Cadillac was incident to the arrest of Robert Johnson.*

The search of an automobile is valid where there is probable cause to believe that it has been used in the commission of a crime.

Brinegar v. United States, 338 U. S. 160 (1949);

Carroll v. United States, 267 U. S. 132 (1924).

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*Compare with Appellants' Brief at page 7h where it is stated: ". . . nor would a warrant for arrest of someone in the house justify the search of the automobile."

III.

The Court Did Not Err in Refusing to Allow Defense Counsel to Learn the Addresses of the Jurors.

Defense counsel asked for the specific address of each juror. The Court ruled that "all that is required of you is that you state the particular portion of the district in which you reside, without giving your exact address" [Tr. 9-10, 29]. In response to this instruction the jurors gave these answers: "I live in Hollywood, in the Los Feliz area" [Tr. 9]; "Westwood" [Tr. 10]; "Beverly Hills" [Tr. 11]; "Long Beach" [Tr. 11]; "I guess you would call it central Los Angeles . . . up Venice, west of Crenshaw" [Tr. 11-12]; "I live in La Habra" [Tr. 12]; "I live in the Pico-Robertson District, Los Angeles 25" [Tr. 12]; "North Hollywood" [Tr. 12]; "In the Hancock Park district" [Tr. 13]; "Glendale" [Tr. 13]; "Pasadena, Oak Knoll area" [Tr. 13]; "Athletic Club, 431 West Seventh Street" [Tr. 14]; "La Mirada" [Tr. 18]; "In Burbank" [Tr. 20]; "In the Wilshire district" [Tr. 22]; "Melrose and Fairfax" [Tr. 23]; "Orange County, Fullerton, to be exact" [Tr. 25]; "Los Angeles" [Tr. 27]; "La Puente" [Tr. 29]. The Judge asked the jurors questions of his own [Tr. 5-31], and asked all questions requested by counsel [Tr. 15-31]. The defense counsel did not use all of his peremptory challenges and he does not claim that the jury was biased or impartial in any respect.

The scope of *voir dire* examination of jurors is within the sound discretion of the trial court.

> *Frederick, et al. v. United States,* 163 F. 2d 536, 550-551 (9th Cir., 1947); cert. den. 332 U. S. 775 (1947);
>
> *Brady v. United States,* 26 F. 2d 400, 403 (9th Cir., 1928), cert. den. 278 U. S. 621 (1928).

The refusal to order the jurors to give their residence addresses was not error.

Hamer v. United States, 259 F. 2d 274, 276-280 (9th Cir., 1958), cert. den. 359 U. S. 916 (1959), pet. for rehear. den. 359 U. S. 962 (April 6, 1959);

Wagner v. United States, 264 F. 2d 524, 526-528 (9th Cir., 1959).

IV.

The Verdicts and Judgments Were Not Contrary to the Law or Evidence.

Knowing concealment of narcotics may be proved by circumstantial evidence.

Mullaney v. United States, 82 F. 2d 638 (9th Cir., 1936);

Rosenberg v. United States, 13 F. 2d 369 (9th Cir., 1926);

United States v. Pinna, 229 F. 2d 216 (7th Cir., 1956);

United States v. Piasano, et al., 193 F. 2d 361 (7th Cir., 1951).

The circumstantial evidence showing Robert Johnson's knowing concealment of the marijuana in Count Three was as follows: He lived in Apartment 3 at 20652 Pacific Coast Highway, the place where the marijuana was found [Tr. 240]. On November 14, 1957 he had sold marijuana to Adrienne Simmrin in that apartment [Tr. 58, 75-80, 89-92, 99-104].

The circumstantial evidence showing Robert Johnson's knowing concealment of the marijuana in Count Four was

as follows: He owned the Cadillac in which it was found [Tr. 249-250], and he had been driving it just before the search [Tr. 108-109].

The circumstantial evidence showing Dona Johnson's knowing concealment of the marijuana in Count Three was as follows: She lived in Apartment 3 at 20652 Pacific Coast Highway, and was there when the marijuana was found.

V.

There Was No Error in the Instruction on Joint and Constructive Possession or in the Instruction on Presumption From Possession.

The Court gave the following instructions:

"Counts 3 and 4 of the indictment allege violation of Title 21, United States Code, Section 176(a), which provides in pertinent part as follows:

'Notwithstanding any other provisions of law, whoever, knowingly, with intent to defraud the United States, * * * receives, conceals, * * * or in any manner facilitates the transportation, concealment, * * * of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, * * *' shall be guilty of an offense.

"You are instructed that the word 'facilitate' as used in the statute and indictment is subject to the ordinary dictionary definition; that is, 'facilitate' means to make easy or less difficult, or to be free from difficulty or impediment.

"Section 176(a) of Title 21, United States Code, under which counts 3 and 4 of the indictment are brought, further provides in part as follows:

> 'Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.'

"As stated, the law provides that if there is proof that a person shall have had in his possession marijuana, such proof is sufficient evidence to authorize conviction, unless such possession is explained to the satisfaction of the jury.

"This does not in any way change the fundamental rule that a defendant is presumed innocent and the burden is on the prosecution to prove guilt beyond a reasonable doubt. It is incumbent upon the government to show that the defendant had possession of the marijuana and this must be proved beyond a reasonable doubt. Once this is proved, the statute which I have just read merely permits the jury to infer that the marijuana involved was imported into the United States contrary to law, and the defendant so knew.

"The law recognizes two kinds of receipt or possession: actual receipt or possession, and constructive receipt or possession.

"A person who, at a given time, knowingly has direct physical control over a thing, is then in actual possession of it.

"A person who, although not in actual possession, knowingly has the power, at a given time, to exercise

dominion or control over a thing, is then in constructive possession of it.

"The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, their possession is joint.

"If you find from the evidence beyond a reasonable doubt that a defendant or defendants, either alone or jointly with others, had actual or constructive possession of the marijuana described in the indictment, then you may find that the marijuana was in the possession of such defendant or defendants within the meaning of the word 'possession' as used in these instructions" [Tr. 317-319].

The last five paragraphs were taken from Form 55 of the Suggested Forms for Use in Criminal Cases, 20 F. R. D. 231, 278. They merely supplement the presumption in 21 U. S. C. Sec. 176(a) which has been sustained as a rule of evidence that does not conflict with the Fourth and Fifteenth Amendments.

Caudillo v. United States, 253 F. 2d 513 (9th Cir., 1958), cert. den. 357 U. S. 931 (1958);

United States v. Cohen, 124 F. 2d 164, 165 (2nd Cir., 1941), cert. den. 315 U. S. 811 (1942);

Mullaney v. United States, 82 F. 2d 638, 641 (9th Cir., 1936);

Velasquez v. United States, 244 F. 2d 416, 418 (10th Cir., 1957);

United States v. Valdes, 229 F. 2d 145, 147 (2nd Cir., 1956), cert. den. 350 U. S. 996 (1956);

United States v. Pinna, 229 F. 2d 216, 218-219 (7th Cir., 1956);

United States v. White, 228 F. 2d 832, 834 (7th Cir., 1956);

Pon Wing Quong v. United States, 111 F. 2d 751, 758 (9th Cir., 1940).

VI.

The Court Did Not Unlawfully Communicate With the Jury.

The chronology of events was as follows:

The jury went out at 10:55 a.m. on March 13, 1958 [C. Tr. 22].

The jury went to lunch at noon and returned at 1:30 p.m. [C. Tr. 22-23].

About 2:30 p.m. the jury sent a note to the Judge stating that they had arrived at a verdict as to Dona Johnson and that they had arrived at a verdict on two counts as to Robert Johnson, but not as to the third count [Tr. 346, 350, 352]. The foreman gave the note to the bailiff who took it to the Judge. The Judge told the bailiff: "Let them sit." The bailiff then told the jury that he had delivered the note to the Judge and that they should continue to deliberate [Tr. 348, 353].

About 2:50 p.m. the jury sent the Court a second note as follows:*

> "Your Honor, we wish to hear the testimony of Mr. Johnson in his last statement. J. Harold Williams, Foreman."

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*There is a conflict in the testimony as to whether this was the first or second note. My brief sets out the version of the Foreman.

The jury was brought into Court and the testimony read in the presence of appellants and their counsel [C. Tr. 23, Tr. 328-333, 348-349, 352-353]. At 3:00 p.m. the jury went out to deliberate again [C. Tr. 23].

About 4:00 p.m. the jury sent the Court a third note:

> "Your Honor, we have reached a unanimous decision. J. Harold Williams, Foreman" [Tr. 347, 349, 354].

At 4:10 p.m. the verdict was read in the presence of appellants and their counsel [Tr. 23].

Defense counsel made a motion for a new trial on March 21, 1958, alleging that there was an "unlawful communication between the court and jury during the deliberation of the jury" [C. Tr. 24-28]. The Court denied the motion, saying:

> "The Court: Well, I might say this with respect to your motion respecting communication: What occurred was just what was testified to by the two witnesses. Under what theory would you consider that unlawful communication? How could the court possibly get word from the jury whether they had arrived at a verdict, or whether they hadn't arrived at a verdict, if they did not deliver that message to the bailiff to deliver to the court?
>
> "As a matter of fact, there is no requirement in the law that the instructions be written at all.
>
> "My own personal instruction to the jury, which I always give, is that any note or any communication that be sent to the court be written. I do that in both civil cases and criminal cases, through an abundance of caution, but there is no requirement in the law.

"As a matter of fact, most judges—I know most judges in the courts that I have been merely have word sent down by word of mouth. But through an abundance of caution, as I have indicated, I have a written note, so that persons who wish to reflect upon the actions of the court may not say that something else occurred than might be in the note.

"Insofar as the note with respect to testimony being read, I handed that note to the clerk or put it up here. There was no requirement that it be put in the file. It didn't have to be put in the file. Whether he puts those in the file or not, I don't know. Frankly, I usually hand those notes up here, because when the jury comes down I ordinarily refer to the note and I put it up here.

"With respect to the note that the foreman sent to the court advising the court that the jury had reached a verdict with respect to Dona Johnson and had reached a verdict with respect to Robert Johnson on two counts but had not on the third count, when I received that note, frankly, I just crumpled it up and threw it in the waste basket and said, 'Let them sit.' Because that is the prerogative of the judge. The judge may call them down or permit them to sit there.

"The jury had been out for about two and a half hours, something of that sort. As I recall, it was in the middle of the afternoon. They had been out only a few hours, and in my judgment they should have remained out until they had completed further deliberations. And that is not a communication between the court and the jury in the sense that you are referring to in the case which you cited to the court, the Albion case" [Tr. 356-358].

The Judge was right. The length of time a jury may be held for deliberation rests in the discretion of the trial court.

Haupt v. United States, 330 U. S. 631, 643 (1947);

Jenkins v. United States, 149 F. 2d 118, 119 (5th Cir., 1945), cert. den. 326 U. S. 721 (1945);

Minkow v. United States, 5 F. 2d 319 (4th Cir., 1925);

United States v. Thomas, 52 Fed. Supp. 571, 588-593 (E. D. Wash., 1943);

Bernal v. United States, 241 Fed. 339, 342 (5th Cir., 1917), cert. den. 245 U. S. 672 (1917).

And failure to discharge a jury after they have announced a disagreement is not coercion.

Campbell v. United States, 221 Fed. 186, 188 (9th Cir., 1915);

United States v. Ingham, 97 Fed. 935, 936-937 (E. D. Pa., 1899).

In any event, not all communications between the Judge and jury are unlawful. In *United States v. Compagna,* 146 F. 2d 524 (2nd Cir., 1944), for example, the jury sent a note to the Judge asking that some of the testimony be reread. The Judge "stopped in the jury room and asked them if that is what they meant about that, if they wanted it read. They said yes. I told them they could go to lunch and we would get it ready and read it to them when we came back." Judge Learned Hand said:

> "As to the visit of the judge, it is true that courts are extremely jealous of anything of the kind, once the jury has been locked up; and we do not wish to abate that jealousy in the least; it is most undesirable

that anything should reach a jury which does not do so in the court room. This is, indeed, too well settled for debate. Mattox v. United States, 146 U.S. 140, 150, 13 S. Ct. 50, 36 L. Ed. 917; Fillipon v. Albion Vein Slate Co., 250 U. S. 76, 81, 39 S. Ct. 435, 63 L. Ed. 853; Dodge v. United States, 2 Cir., 258 F. 300, 303, 304, 7 A. L. R. 1510; Little v. United States, 10 Cir., 73 F. 2d 861, 864, 865, 96 A. L. R. 889. But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity. Dodge v. United States, supra, 258 F. 300, 7 A. L. R. 1510; Rice v. United States, 2 Cir., 35 F. 2d 689, 696; United States v. Graham, 2 Cir., 102 F. 2d 436, 444. There cannot be the slightest doubt here that the informality-for, at most, it was no more—did not prejudice the accused."

See also:

Ferrari v. United States, 244 F. 2d 132, 143-146 (9th Cir., 1957), cert. den. 355 U. S. 873 (1957);

Peppers v. United States, 37 F. 2d 346 (6th Cir., 1930).

VII.

The Court Did Not Err in Denying Motions for Judgment of Acquittal.

The Government believes that the evidence, previously set forth in the Statement of Facts, was sufficient to sustain the verdicts.

VIII.

The Court Did Not Err in Giving an Instruction in the Language of 26 U. S. C., Sec. 7491.

The Judge gave this instruction:

"Count 1 of the indictment charges a violation of Title 26, United States Code, Section 4742(a), which section provides in pertinent part as follows:

'It shall be unlawful for any person . . . to transfer marijuana except in pursuance of a written order of the person to whom such marijuana is transferred, on a form to be issued in blank for that purpose by the Secretary of the Treasury or his delegate.'

"Under the laws of the United States there is imposed upon all transfers of marijuana, with exceptions hereafter described, a special tax. In connection with this tax the law requires that at the time a transfer of marijuana is made, the transferee must draw a written order for the same on a form issued for that purpose by the Secretary of the Treasury. The transferee is the person who, upon transfer of the marijuana, receives the marijuana. The special tax is to be paid by the transferee at the time he obtains the order form.

"When the transfer of marijuana is made, the transferee, in order to comply with the laws relating to the transfer of marijuana, and having previously obtained the order form, in duplicate, is required to give a copy to the person from whom he obtained the marijuana, and he is further requried to retain a copy. The person transferring the marijuana, that is the transferor, is required by the law to receive such an

order form from the transferee before or at the time that he transfers the marijuana to such transferee. These forms must be retained by both transferor and transferee for a period of two years, and they must be kept available for inspection.

"Certain persons, such as physicians, dentists, veterinary surgeons, are excepted from the foregoing law relating to the transfer of marijuana. However, these persons must also obtain order forms and pay a special tax required by law, and must further comply with the regulations of the Secretary of the Treasury relating to the transfer of marijuana for scientific and medical purposes.

"Title 26, United States Code, Section 7491, provides in part as follows:

> '* * * in the absence of the production of evidence by the defendant that he has complied with the provisions of * * *, Section 4742, relating to order forms, he shall be presumed not to have complied with such provisions * * *.'

"The foregoing statute, however, does not change in any way the fundamental rule that a defendant is presumed to be innocent until proven guilty beyond all reasonable doubt. Nor does it impose upon the defendant the burden of producing any evidence. In other words, it is not incumbent upon the defendant to prove his innocence, but as previously stated, the prosecution must prove guilt beyond all reasonable doubt before you may convict the accused.

"What the statute does provide is that upon a trial for a violation of Section 4742 of Title 26, United States Code, if the jury should find from the evidence

beyond a reasonable doubt that the defendant has transferred marijuana, the fact of such transfer alone permits the jury to draw the inference that the defendant transferred marijuana without having obtained the necessary written order form" [Tr. 314-317].

Robert Johnson produced no evidence that he had complied with 26 U. S. C. Sec. 4742 [Tr. 167]. The statute simply states a rule of evidence which in no way contravenes the Constitution.

United States v. Williams, 161 F. 2d 835, 837 (2nd Cir., 1947).

Conclusion.

1. The evidence should be viewed most favorably to the Government.

2. There were no unlawful searches and seizures in violation of the Fourth and Fifth Amendments.

3. The Court did not err in refusing to allow counsel to learn the addresses of the jurors.

4. The verdicts and judgments were not contrary to the law or evidence.

5. There was no error in the instructions on joint and constructive possession or in the instruction or presumption from possession.

6. The Court did not unlawfully communicate with the jury.

7. The Court did not err in denying motions for judgment of acquittal.

8. The Court did not err in giving an instruction in the language of 26 U. S. C. Sec. 7491.

Respectfully submitted,

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